

SO ORDERED.

SIGNED this 11th day of December, 2020.




LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT NORTH CAROLINA
DURHAM DIVISION

In re:)	
)	
Heather Ann Wendt,)	Case No. 19-80420
)	
Debtor.)	Chapter 13

ORDER DENYING MOTION TO SEAL SETTLEMENT AGREEMENT

THIS MATTER came before the Court on the Motion to File Document Under Seal (Docket No. 24, the “Motion”), filed by Heather Ann Wendt (the “Debtor”) on October 14, 2020. For the reasons set forth below, the Court will deny the Motion.

Section 107(a) of the Bankruptcy Code prescribes that “ a paper filed in a case under this title and the dockets of a bankruptcy court are *public records and open to examination* by an entity at reasonable times without charge.” 11 U.S.C. § 107(a) (emphasis added); *see also Oliner v. Kontrabecki*, 745 F.3d 1024, 1027 (9th Cir. 2014) (holding that a party seeking to file documents under seal must provide “compelling reasons” in order for the court to seal records of a proceeding that was settled); *In re Thomas*, 583 B.R. 385, 390 (Bankr. E.D. Ky. 2018) (stating that “Congress has codified a strong presumption in favor of public access to all papers filed [in bankruptcy matters]” providing only very limited exceptions); *In re Gordon Properties, LLC*, 536 B.R. 703, 709 (Bankr. E.D. Va. 2015) (describing how “§ 107(a) . . . establishes a broad right of access to

papers filed in a bankruptcy case”); *In re Analytical Sys., Inc.*, 83 B.R. 833, 836 (Bankr. N.D. Ga. 1987) (stating that “simply showing that the information would harm the company’s reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records”) (internal citations omitted). That is to say that “any limitation on the public’s right of access ... must be viewed as an extraordinary measure that is warranted only under rare circumstances.” 2 COLLIER ON BANKRUPTCY ¶ 107.03 (16th ed. 2020).

In essence, the right to examine public records is an expansive one and the Bankruptcy Code provides very limited exceptions to that right in subsections (b) and (c) of § 107.¹ Under subsections (b) and (c), the right to access public records is limited to (i) protecting trade secrets or confidential research, development, or commercial information, (ii) protecting “a person with respect to a scandalous or defamatory matter,” and (iii) protecting an individual from an “undue risk of identity theft or other unlawful injury to the individual or the individual’s property.” 11 U.S.C. § 107(b)-(c). Rule 9018 of the Federal Rules of Bankruptcy Procedure implements § 107.

A party seeking to file a document under seal under § 107(b) and Rule 9018 must also comply with Local Rule 5005-4(6)(a) which requires that a motion to seal a document provide a non-confidential description of the document to be sealed and

(1) state the reasons why sealing is necessary; (2) state the reasons why less drastic alternatives to sealing the document will not afford adequate protection; (3) address the factors governing the sealing of documents reflected in governing case law; and (4) state whether permanent sealing is sought, and, if not, state how long the document should remain under seal and how the document should be handled upon unsealing.

Bankr. M.D.N.C. R. 5005-4(6)(a).

Furthermore, the movant has the burden to prove that documents to be filed under seal are protected under the exceptions provided in § 107(b). *In re Thomas*, 583 B.R. at 391. Courts have denied movants relief under § 107 because they have failed to show that protection is warranted under the circumstances. *In re Muma Servs.*, 279 B.R. 478, 485 (Bankr. D. Del. 2002) (maintaining that allowing the movant “to file documents under seal simply because it unilaterally agreed to keep matters confidential” would render §

¹ Section 107 also recognizes § 112 as another exception. Section 112 restricts public access to papers for the protection of minor children.

107 meaningless); *In re Waring*, 406 B.R. 763, 768–69 (Bankr. N.D. Ohio 2009) (holding that the creditor failed to satisfy burden of showing that any information in the reaffirmation agreement was in the nature of “trade secrets” or “confidential commercial information” deserving of the bankruptcy court’s protection); *In re Thomas*, 583 B.R. at 394 (holding that the debtor’s settlement against a telecommunications provider for its alleged violations of the automatic stay, including settlement amount, was not confidential “commercial information,” of the kind which a bankruptcy court could protect by a sealing order) (internal citation omitted). Similarly, another bankruptcy court held that § 105(a) cannot be used as a basis for “conjuring up another public access exception,” as § 107 specifically establishes the only exceptions when judicial records can be restricted. *In re Petersen*, 597 B.R. 434, 439 (Bankr. D. Colo. 2019).

While settling parties may wish to keep their settlement agreement confidential, the “[p]arties’ broad statements regarding their desire for confidentiality is not a basis to seal the records at issue from public view.” *In re Thomas*, 583 B.R. at 391. The movant must demonstrate to the court that the terms of the settlement agreement constitute “scandalous or defamatory matter[s]” or trade secrets or confidential research, development, or commercial information worthy of protection under § 107(b) and Bankruptcy Rule 9018. Moreover, courts require some evidentiary basis, such as an affidavit, to conclude whether such documents are entitled to protection under § 107(b). See *In re Thomas*, 583 B.R. at 391.

Here, the Debtor moves this Court for an order allowing the parties to file the motion to approve settlement agreement under seal, citing § 105(a) and § 107(b) as authority for her requested relief. In support of the Motion, the Debtor primarily relies on the argument that confidentiality is an essential element of the settlement agreement and that public release of the terms of the agreement would reveal scandalous and defamatory matters concerning the defendant, whose identity has not been provided to the Court. The Debtor further argues that the settlement includes sensitive and confidential details about the Debtor’s medical condition.

The Debtor has not satisfied her burden to show the circumstances merit the denial of public access to the entire settlement agreement. While the Debtor asserts that the settlement agreement contains scandalous information about the unnamed defendant

and the defendant is concerned that negative publicity or attention could follow, these conclusory statements are not supported by an affidavit or declaration. Moreover, the Debtor's Motion fails to comply with Local Rule 5005-4(6), which requires substantive analysis of the merits of the Debtor's request. While the Court acknowledges the desire of the parties to keep their settlement agreement confidential, courts have held that confidentiality provisions in settlement agreements are insufficient to justify keeping the substance of such settlements from public access, and this Court agrees with that rationale. *In re Thomas*, 583 B.R. at 391. Finally, the Debtor has failed to make a showing that there are no alternative or less drastic measures available as required by Local Rule 5005-4(6)(a)(2).

As the Debtor has not provided the Court with compelling reasons that overcome the presumption in favor of access to the court's records, IT IS ORDERED that the Motion is DENIED without prejudice.

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PARTIES TO BE SERVED

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19-80420

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